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No. 94-748

In the Supreme Court of the United States

OCTOBER TERM, 1994

YONG HYON KIM, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner was seized within the meaning of the Fourth Amendment when a federal agent engaged him in conversation in the sleeper-car of a passenger train.

2. Whether petitioner's consent for the agent to search his luggage implied consent for the agent to look inside a canister that appeared to hold commercially available vegetable protein.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 2a-49a) is reported at 27 F.3d 947.

JURISDICTION

The judgment of the court of appeals was entered on June 30, 1994. A petition for rehearing was denied on July 27, 1994. Pet. App. 1a. The petition for a writ of certiorari was filed on October 25, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Pennsylvania, petitioner was convicted of possessing methamphetamine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1). Pet. App. 6a. He was sentenced to 300 months' imprisonment. *Id.* at 3a. The court of appeals affirmed. *Id.* at 2a-49a.

1. On August 26, 1992, Drug Enforcement Administration (DEA) Special Agent Kevin Small observed petitioner and his confederate, Song Youn, on an Amtrak train that had stopped in Albuquerque, New Mexico, on its way from Los Angeles, California, to Chicago, Illinois. Agent Small knocked on the door of the roomette occupied by petitioner and Youn. Petitioner opened the door. A concealed device on Agent Small recorded the ensuing conversation. Small was accompanied by Albuquerque Police Officer Sam Candelaria, who remained out of sight around the corner of the train corridor. Pet. App. 4a-5a.

Small said in a "polite and conversational tone," Pet. App. 5a, "How are you guys doing? I'm with the police department." *Ibid.* He then bent down to show his badge to petitioner and Youn, who were seated. *Ibid.* Small then asked, "Can I talk to you for a second?" *Id.* at 9a. In response, "[w]ithout hesitation or equivocation," petitioner responded, "Yeah." *Ibid.* Small then knelt in the hallway, without blocking the doorway or entering the roomette, while he continued the conversation. *Id.* at 5a. He asked about the travelers' point of origin, destination, and place of residence. Petitioner "readily responded" (*ibid.*) to the questions. Small asked if he could see their tickets. Youn produced two tickets in the names of Yong Kim and Terry Park. While Youn showed the tickets, Small asked how the ride had been thus far. Youn

replied, "Real good." Small handed the tickets back to Youn and thanked him. Small then inquired if they had any photo identification. Youn said his name was "Park" and that he had no picture identification with him, while Kim said he had such identification. Candelaria, out of sight of Kim and Youn, signaled to Small that the train reservation was made out in a different name from the tickets. Small asked to see the tickets again and handed them back to Youn. *Ibid.*

Small asked about petitioner's and Youn's luggage. He told them that he worked for the DEA and that the DEA "had problems with people on board trains smuggling drugs out of L.A. back East." He then asked, "You guys don't have drugs in your luggage today, do you?" Petitioner stated that he did not. Small asked, "Would you voluntarily consent for me to search?" Petitioner replied, "Sure." Pet. App. 5a.

Small pointed to a leather bag and asked if it belonged to petitioner. Petitioner said that it did. Youn also offered to move his bags down for Small, but Small stated that he wanted to examine the bags one at a time. Pet. App. 5a-6a.

Upon opening the leather bag, Small found six cans of "Naturade All-Natural Vegetable Protein." They appeared to be factory-sealed cans with factory lids intact. Small asked what it was and what it was for. Petitioner replied that it was vegetable protein and that he did not know what it was because he "got it for a present." Small asked petitioner where he got it and petitioner replied: "We bought it in L.A." Small asked petitioner if he was sure what the cans contained. Petitioner did not respond, but Youn answered: "It's closed." Small opened one of the cans and asked petitioner who had given the cans to him. Petitioner replied: "The guy in L.A." Small asked, "What guy?". There was no answer. Small then

handed the can to Candelaria, who determined that it contained drugs. Petitioner and Youn were arrested. Pet. App. 6a.

2. The district court denied petitioner's motion to suppress the methamphetamine found in the containers. The jury convicted petitioner of possession of the drug with intent to distribute it, but acquitted him of a conspiracy count. Pet. App. 6a.

3. The court of appeals affirmed. Pet. App. 2a-49a. The court rejected petitioner's contention that he had been unconstitutionally seized during the questioning by Agent Small in the roomette. *Id.* at 7a-16a. Applying *Florida* v. *Bostick*, 501 U.S. 429 (1991), the court assessed whether "a reasonable person would feel free 'to disregard the police and go about his business'" and "'whether a reasonable person would feel free to decline the officers' requests or otherwise terminate the encounter.'" Pet. App. 8a (quoting *Bostick*, 501 U.S. at 434, 436). The court concluded that "[petitioner] voluntarily answered Small's questions" and that "the encounter was consensual." Pet. App. 16a. In explaining that determination, the court noted, *inter alia*, that Small was in plain clothes and did not display his gun, *id.* at 9a; that the district court had found that Small did not block the doorway or exit, *id.* at 11a; that the roomette was in a "well-trafficked area" and the encounter was observed by other passengers, *ibid.*; and that Small's tone was "polite and conversational," *id.* at 14a. The court consequently rejected petitioner's contention that his consent to the search of his bag was tainted by an unlawful seizure. *Id.* at 16a-19a.

The court also rejected petitioner's argument that his consent for Small to search his luggage did not extend to a search of the containers in the luggage. Pet. App. 19a-23a. The court recognized that "the scope of the search

is limited by the terms of its authorization." *Id.* at 19a (quoting *Walter* v. *United States*, 447 U.S. 649, 656 (1980)). The court observed that "[t]he standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of 'objective' reasonableness—what would the typical reasonable person have understood by the exchange between the officer and the suspect?". Pet. App. 19a (quoting *Florida* v. *Jimeno*, 500 U.S. 248, 251 (1991)). Under the circumstances, the court concluded, "a reasonable person would understand [petitioner's] authorization for a search of his luggage to include permission to search any items found inside his luggage." Pet. App. 20a. The court also noted that petitioner "did not attempt to impose any limitations on his general permission." *Id.* at 23a.[1]

Judge Becker dissented, asserting that "a reasonable person in [petitioner's] position would not have felt free to terminate the encounter and hence that there was a seizure." Pet. App. 33a. In the dissenting judge's view, "Agent Small confronted [petitioner] in a non-public part of the train, blocked [his] exit from the roomette, asked [him] focused and incriminating questions, and never advised [him] that he had a right to terminate the encounter." *Ibid.* The dissenting judge also believed that "Small exceeded the scope of [petitioner's] consent when he opened one of the sealed * * * canisters he found in [petitioner's] luggage." *Ibid.*

ARGUMENT

1. Petitioner acknowledges (Pet. 7) that the court of appeals correctly articulated the legal principles applic-

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[1] The court also rejected petitioner's argument (not pressed in this Court) that the district court had improperly enhanced his Sentencing Guidelines sentence two offense levels under Guidelines § 3C1.1 for obstruction of justice. Pet. App. 24a-31a.

able to the determination of whether a Fourth Amendment seizure had occurred. He contends, however, that the court misapplied the totality-of-the-circumstances approach to the facts of this case. That contention is without merit.

In *Florida* v. *Bostick*, 501 U.S. 429 (1991), police encountered Bostick aboard a public bus. The Florida Supreme Court held that "an impermissible seizure result[s] when police mount a drug search on buses during scheduled stops and question boarded passengers without articulable reasons for doing so, thereby obtaining consent to search the passengers' luggage." *Id.* at 433 (internal quotation marks omitted). This Court rejected a per se rule controlled by the location of the police encounter. Instead, the Court reiterated that "the crucial test is whether, taking into account all of the circumstances surrounding the encounter, the police conduct would have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business. * * * Where the encounter takes place is one factor, but it is not the only one." *Id.* at 437 (internal quotation marks omitted). "[I]n order to determine whether a particular encounter constitutes a seizure, a court must consider all the circumstances surrounding the encounter to determine whether the police conduct would have communicated to a reasonable person that the person was not free to decline the officers' requests or otherwise terminate the encounter. That rule applies to encounters that take place on a city street or in an airport lobby, and it applies equally to encounters on a bus." *Id.* at 439-440.

The court of appeals in this case correctly applied the legal standard and reasoning of *Bostick*. The court observed that its task was "to decide whether, under the totality of the circumstances in the case *sub judice*, a

reasonable person would have felt free to decline Small's request or otherwise terminate the encounter with him." Pet. App. 8a. The court also stated that in its "assessment of the encounter, [it] must accord all factors an appropriate weight rather than treat any one factor as dispositive." *Ibid.* Applying that test, the court correctly concluded that a reasonable innocent person, see *Bostick*, 501 U.S. at 438, would have felt free to terminate the encounter with Small or to decline his request for permission to search the luggage.

Petitioner (Pet. 8-13) identifies four factors that he claims were improperly evaluated by the court of appeals. Petitioner's contention is entirely fact-specific and thus does not warrant this Court's review. In any event, the court of appeals gave appropriate weight to each of those factors.

Petitioner emphasizes (Pet. 8-10) the confined area of the train's sleeper-compartment section where the encounter occurred. The court of appeals considered that factor (see Pet. App. 10a) but found that, under the circumstances of this case, the train encounter was not in such a cramped or isolated setting that it would be in any way coercive. The encounter occurred not inside a closed, compact roomette, but through the open door while Small knelt in a hallway that was "bustling" with other passengers. See *id.* at 10a n.2. Compare *Bostick*, 501 U.S. at 436 (noting that "Bostick's movements were 'confined' in a sense, but this was the natural result of his decision to take the bus; it says nothing about whether or not the police conduct at issue was coercive.").

Petitioner next (Pet. 10-11) observes that Small did not advise him that he had a right to terminate the encounter. The majority considered that factor as part of its analysis and recognized that the provision of such

advice would have given further evidence of the consensual nature of an encounter. See Pet. App. 15a. The court concluded, however, that such advice was not a legal prerequisite—a conclusion that petitioner here concedes to be correct. See Pet. 10-11.

Petitioner next argues (Pet. 11-12) that Small asked incriminating questions and told petitioner that he was suspected of unlawful activity. There is nothing inherently coercive, however, about approaching persons "as to whom [the police] have no reasonable suspicion and ask[ing] them potentially incriminating questions." *Bostick*, 501 U.S. at 439.[2] The court of appeals determined that Small's questions were not accusatory and that his "tone * * * in no way implied that Small accused or believed that [petitioner] had drugs in his possession." Pet. App. 13a. The court noted in addition that "what a guilty passenger would feel and how he would react are irrelevant to our analysis because 'the "reasonable person" test presupposes an *innocent* person.'" *Ibid.* (quoting *Bostick*, 501 U.S. at 438).

Finally, petitioner claims (Pet. 13) that Small blocked the exit from the sleeper roomette. The district court concluded, however, that Small had not blocked the doorway or exit, and the court of appeals determined that that finding was not clearly erroneous. Pet. App. 11a. As the court of appeals noted, the record contained uncontradicted testimony by Small that "he knew he was 'supposed to [leave] enough room for someone to pass by [him],' and that he 'was not blocking the door.'" *Ibid.*

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[2] Petitioner relies (Pet. 12) on cases from other circuits that contain language attaching a greater importance to the incriminating nature of the questions. As the court of appeals noted (Pet. App. 14 n.5), those cases pre-date *Bostick*. They do not create a conflict warranting this Court's review.

Petitioner invites this Court (Pet. 14-18) to use this case as an opportunity to review the current standards for determining what conduct constitutes a seizure in settings such as the one. All the courts of appeals that have considered sleeper-car encounters with police have held that *Bostick*'s totality-of-the-circumstances approach governs the determination of whether an encounter is consensual, and that no single factor should be given controlling weight. See *United States* v. *Little*, 18 F.3d 1499 (10th Cir. 1994) (en banc); *United States* v. *Jones*, 990 F.2d 405, 408 (8th Cir.), cert. denied, 114 S. Ct. 350 (1993); *United States* v. *Tavolacci*, 895 F.2d 1423, 1424-1426 (D.C. Cir. 1990). Already this Term, this Court has denied review in two other sleeper-car cases raising issues similar to that presented in the instant case. See *Scudder* v. *United States*, cert. denied, 115 S. Ct. 433 (1994); *Girolamo* v. *United States*, cert. denied, No. 94-5516 (Dec. 5, 1994).

2. Petitioner also challenges (Pet. 18-20) the court of appeals' conclusion that his consent to search his luggage implied consent to search the canisters found in the luggage. In *Florida* v. *Jimeno*, 500 U.S. 248 (1991), this Court held that the permission granted to search a suspect's car included consent to open a folded paper bag on the floorboard, *id.* at 251, but suggested that the consent to search a car trunk would not extend to breaking open a locked briefcase within the trunk, *id.* at 251-252. Petitioner argues that the canisters in this case were more analogous to the locked briefcase than to the closed paper bag. That factbound claim does not warrant review by this Court. In any event, the court of appeals correctly resolved the issue on the facts of this case.

The canisters in this case are distinguishable in several respects from a locked briefcase. First, peti-

tioner already had granted consent to search a closed container—his luggage—within which one ordinarily places personal effects to keep them private. That consent reasonably implied consent to open smaller containers inside the luggage that likewise might hold personal effects, such as the pockets of clothing, a toiletry bag, or a canister. Second, the canisters in this case, unlike a briefcase, did not appear to be the kind of container in which one might keep personal effects. The canisters, objectively viewed, seemed to hold commercially available vegetable protein. Moreover, although the canisters appeared to have been sealed at the factory to preserve the freshness of the product, the seal was not a signal that the owner wished to protect the privacy of the contents, as would be the case with a locked briefcase. Finally, petitioner had the opportunity to object to the opening of the canister or to the inspection of its contents, and he elected not to make such an objection.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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